

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: MR. AND MRS. GREGORY SWECKER, Complainants, vs. MIDLAND POWER COOPERATIVE, Respondent.	DOCKET NO. FCU-99-3 (C-99-76)
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**ORDER DENYING MOTION TO STRIKE AND SPECIFYING
ISSUES TO BE DECIDED ON APPEAL**

(Issued June 21, 2000)

INTRODUCTION

On March 28, 2000, the administrative law judge for the Utilities Board (Board) issued a proposed decision and order in this matter. In response to a timely motion, the administrative law judge issued an order reopening the record on April 26, 2000, and on May 18, 2000, the judge issued an order amending the proposed decision and order. As described below, the parties to this proceeding have appealed various aspects of these orders to the Board, pursuant to Iowa Code § 17A.15(3) (1999 Supp.) and 199 IAC 7.8. This order is being issued pursuant to Board rule 7.8(2)"d," which requires that the Board rule on the issues to be decided on appeal within 20 days of the filing of a notice of appeal.

RELEVANT PROCEDURAL HISTORY

For purposes of this order, the Board will rely on the statement of the case contained in the proposed decision and order issued March 28, 2000, to describe the events, pleadings, and evidence to that date.

On April 10, 2000, Midland Power Cooperative (Midland), Central Iowa Power Cooperative (CIPCO), and the Iowa Association of Electric Cooperatives (IAEC) filed a joint motion to reconsider and joint motion to reopen the hearing, seeking to present additional evidence regarding the issue of the 12-day disconnection notice and reconsideration of the proposed decision on that issue. Pursuant to 199 IAC 7.7(15), the motion to reopen the record stayed the time for filing an appeal to the Board.

On April 11, 2000, Mr. and Mrs. Gregory Swecker (Complainants) filed a notice of appeal from the proposed decision and order. They specified four issues for review by the Board:

1. The proposed decision and order should have held that Midland and other nonrate-regulated utilities must provide net billing to their cogenerating customers.
2. The proposed decision and order requires Complainants to pay a portion of the cost of the special meter required for their service, but did not specify how the cost of the special meter should be apportioned between Complainants and Midland.

3. The proposed decision and order allowed Midland to charge a 40 percent markup on the cost of the special meter, which Complainants believe to be discriminatory because regular three-phase customers are not charged for equipment related to their electrical service.

4. The proposed decision did not require Midland to purchase energy and capacity from cogenerators at avoided cost, as required by 18 C.F.R. §§ 292.303 and 292.304.

On April 24 and 25, 2000, Midland, CIPCO, and IAEC filed responses to Complainants' notice of appeal, generally supporting the proposed decision and order with respect to the Complainants' issues. On the same date, the Complainants and the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed separate answers and objections to the joint motions to reconsider and reopen the hearing.

On April 26, 2000, the administrative law judge issued an order granting the motion to reopen the record and permitting the parties to submit additional evidence regarding the issue of the legality of Midland's disconnection of the Complainants' service on March 22, 1999. Additional evidence was filed by Midland on May 10, 2000.

On May 18, 2000, the administrative law judge issued an order amending the proposed decision and order, generally finding that Midland complied with the applicable legal requirements when it disconnected the Complainants.

On May 20, 2000, Mrs. Beverly Swecker submitted a letter intended for inclusion in the record and disputing the administrative law judge's determination that the testimony of the Midland witness regarding the disconnection was more credible than Mrs. Swecker's testimony.

On June 1, 2000, Complainants filed an amendment to their notice of appeal, adding a fifth issue: Whether the order amending the proposed decision and order correctly addressed Complainants' rights and remedies to avoid disconnection pursuant to 199 IAC 20.4(16)"c" and 199 IAC 20.4(15)"h"(6).

On June 2, 2000, CIPCO and IAEC filed a notice of appeal, identifying two issues for Board review: First, whether the Board has jurisdiction to address a complaint of discrimination against a cooperative that is not subject to the rate jurisdiction of the Board, and second, whether the administrative law judge erred in finding the cogeneration tariff rates of Midland were discriminatory.

Also on June 2, 2000, Midland filed a joinder in the notice of appeal filed by CIPCO and IAEC.

On June 7, 2000, Consumer Advocate filed a notice of cross-appeal. Consumer Advocate states that the issue it is presenting for review is whether Iowa electric cooperative associations are subject to the requirements of Iowa Code §§ 476.41-45 and, therefore, subject to the Board's rules implementing or adopted pursuant to those statutes, including the Board's net billing rule. In its notice, Consumer Advocate recognizes that the Board's procedural rules normally require that a notice of appeal must be filed within 15 days of a proposed decision and order. However, Consumer Advocate argues that sound public policy supports the use of

cross-appeals to present issues for review, relying on Consumer Advocate Division, Dept. of Justice v. Iowa Utilities Bd., 423 N.W.2d 552, 552-53 (Iowa Ct. App. 1988) and other authorities.

On June 13, 2000, Complainants filed a response to the notice of appeal filed by CIPCO and IAEC. Complainants generally assert that the Board has jurisdiction to enforce Iowa Code § 476.21 and that the administrative law judge correctly found that Midland's Tariff 26.16 was unreasonably discriminatory. On the same date, Complainants also filed a joinder in Consumer Advocate's cross-appeal.

On June 14, 2000, CIPCO and IAEC filed a motion to strike Consumer Advocate's cross-appeal, arguing that Consumer Advocate failed to perfect its appeal by filing a timely notice, as required by the Board's rules.

On the same date, CIPCO and IAEC filed a response to Consumer Advocate's cross-appeal. The response was submitted in the alternative to the motion to strike and did not waive that motion. While agreeing that the relevant statutes are not entirely clear, CIPCO and IAEC supported the administrative law judge's holding that Iowa Code §§ 476.41-45 (and the rules adopted pursuant to that authority, including the net billing rule) do not apply to electric cooperative associations such as Midland, citing Iowa Power and Light Co. v. Iowa State Commerce Comm'n, 410 N.W.2d 236 (Iowa 1987) and the underlying district court decision, Iowa Power and Light Co. v. Iowa State Commerce Comm'n, AA677 and AA790, Polk County District Court (1986).

Also on June 14, 2000, Midland and, separately, CIPCO and IAEC filed responses to Complainants' amendment to their notice of appeal, generally

supporting the administrative law judge's order amending the proposed decision and order.

Finally, on June 16, 2000, Consumer Advocate filed a response to the notice of appeal filed by CIPCO and IAEC.

Throughout all of these pleadings, no party has asked to file further written briefs or to present oral argument to the Board, although every party has asked that it be given that opportunity if any other party seeks the same.

MOTION TO STRIKE

The first matter the Board will address is the motion to strike. The Board's rules normally contemplate that any party who intends to seek further review of a proposed decision must file a notice of appeal, in a form substantially complying with the Board's rules, within 15 days of the issuance of the proposed decision. Consumer Advocate relies upon Consumer Advocate Division, Dept. of Justice v. Iowa Utilities Bd., 423 N.W.2d 552, 552-53 (Iowa Ct. App. 1988), as authority for permitting a party to file a cross-appeal even after the 15-day period has expired. In that case, one party to a Board docket filed a timely petition for judicial review in Polk County District Court; the adverse party then filed a cross-petition. The Board and the original party moved to dismiss the cross-petition, arguing it was an untimely appeal. The district court denied the motions and heard the appeal, ruling that neither the law nor public policy required dismissal of the cross-petition. The Court of Appeals affirmed.

The Board agrees that neither the law nor public policy *requires* dismissal of Consumer Advocate's cross-appeal. The Board interprets this to mean that the question of whether to allow a cross-appeal is a matter within the discretion of the agency, and the Board will exercise its discretion, deny the motion to strike, and consider Consumer Advocate's issue along with the issues presented by the other parties. However, the Board does not recommend that parties rely upon this decision and follow this course of action in future proceedings. The Board has only 20 days to review the (sometimes numerous) notices of appeal and issue an order specifying the issues to be considered on appeal and establish a procedural schedule, if one is required. Delay in filing an appeal can make it unnecessarily difficult to evaluate the case, identify all of the issues, and set a schedule. Thus, in other circumstances, the Board may find it appropriate to strike a cross-appeal, but in this case the Board will exercise its discretion and deny the motion to strike.

ISSUES ON APPEAL

The second matter the Board will address is to specify the issues on appeal, as required by 199 IAC 7.8(2)"d." They are as follows:

Complainant issues

1. The proposed decision and order should have held that Midland and other non-rate-regulated utilities must provide net billing to their cogenerating customers.
2. The proposed decision and order requires Complainants to pay a portion of the cost of the special meter required for their service, but

did not specify how the cost of the special meter should be apportioned between Complainants and Midland.

3. The proposed decision and order allowed Midland to charge a 40 percent markup on the cost of the special meter, which Complainants believe to be discriminatory because regular three-phase customers are not charged for equipment related to their electrical service.

4. The proposed decision did not require Midland to purchase energy and capacity from cogenerators at avoided cost, as required by 18 C.F.R. §§ 292.303 and 292.304.

5. Whether the order amending the proposed decision and order correctly addressed Complainants' rights and remedies to avoid disconnection pursuant to 199 IAC 20.4(16)"c" and 199 IAC 20.4(15)"h"(6).

Midland, IAEC, and CIPCO issues

6. Whether the Board has jurisdiction to address a complaint of discrimination against a cooperative that is not subject to the rate jurisdiction of the Board.

7. Whether the administrative law judge erred in finding the cogeneration tariff rates of Midland were discriminatory.

Consumer Advocate issue

8. Whether Iowa electric cooperative associations are subject to the requirements of Iowa Code §§ 476.41-45 and, therefore, subject to

the Board's rules implementing or adopted pursuant to those statutes, including the Board's net billing rule.

Finally, the Board notes that the parties have already briefed all of these issues and that none of the parties requested an opportunity to file further briefs or make oral argument unless some other party is granted that opportunity. The Board believes it can address each of the identified issues on the basis of the existing record and the briefs filed to date and will not establish a procedural schedule for the filing of additional briefs or for oral argument.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The motion to strike filed by CIPCO and IAEC on June 14, 2000, is denied.
2. Pursuant to 199 IAC 7.8(2)"d," the Board rules that the issues to be decided on appeal are as specified in the body of this order, above.

UTILITIES BOARD

/s/ Allan T. Thoms

/s/ Susan J. Frye

ATTEST:

/s/ Raymond K. Vawter, Jr.
Executive Secretary

/s/ Diane Munns

Dated at Des Moines, Iowa, this 21st day of June, 2000.